In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:	)	
	)	Chapter 11 Case
JOHN R. RICH	)	
	)	Number 93-40486
Debtor	)	
	)	
	)	
	)	
UNITED STATES OF AMERICA	)	
on behalf of the	)	
Internal Revenue Service	)	
	)	
Movant	)	
	)	
	)	
	)	
v.	)	
	)	
JOHN R. RICH	)	
and	)	
JACK K. BERRY,	)	
Assistant United States Trustee	)	
	)	
Respondents	)	

MEMORANDUM AND ORDER

Movant filed a Motion for relief from the automatic stay on September 15, 1993. The Motion seeks permission to continue with a proceeding against the Debtor which is currently pending before the United States Tax Court. A hearing was held on the Motion on October 21, 1993. Based on the evidence presented at the hearing, the briefs submitted

by the parties and the record in the file, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The above-captioned Chapter 11 case was filed March 19, 1993. The schedule of creditors holding the twenty largest unsecured claims filed with the voluntary petition listed the Internal Revenue Service ("IRS") and Sarah Rich, Debtor's former wife, as the only such creditors. Debtor's Schedule "A" revealed one secured creditor, the holder of the first mortgage on Debtor's residence owned jointly with his current wife with a full fair market value of $230,000.00 and a mortgage of approximately $170,000.00. Debtor also scheduled miscellaneous personal property with an estimated value of $18,176.97, unsecured priority claims owed the IRS in the amount of $105,788.39 and an unsecured non-priority claim of $1,000.00 for current alimony to Debtor's former wife.

Debtor's case was scheduled for a creditors' meeting pursuant to 11 U.S.C. Section 341 on April 23, 1993, at which he revealed that two transfers were made to his wife within approximately one month prior to filing his case. By order entered March 23, 1993, Debtor was required to file his Disclosure Statement and Plan not later than August 23, 1993.

On September 15, 1993, the United States, acting on behalf of the Internal Revenue Service, filed a Motion for Relief from Stay seeking permission to continue a

proceeding pending before the United States Tax Court. The Motion, together with the attachments thereto and the uncontradicted facts stipulated to by the parties at the hearing, reveal that in July of 1987 Debtor and his former wife received a notice of deficiency for their tax obligation for the taxable year ending December 31, 1983, asserting a deficiency in the amount of $32,931.00 plus penalties and interest.

On October 8, 1987, Debtor and his former wife filed a petition in the United States Tax Court. The prayers in the petition requested that the court determine the Internal Revenue Service to have erred in issuing the notice of deficiency and sought a determination that all the deductions and credits claimed by
the petitioners for 1983 were allowable and for other relief. The case was scheduled for trial to commence on March 22, 1993. When the case was called for trial on March 22nd, the respondent Internal Revenue Service informed the special trial judge that the Debtors had filed a Chapter 11 proceeding, and the court thereafter entered an order staying the Tax Court proceeding as to Mr. Rich and continued the case as to his former wife. That order further required Mr. Rich to file a status report on or before September 24, 1993 with respect to his bankruptcy case.

The tax liability at issue arises out of certain transactions engaged in by the Debtor regarding a particular tax shelter which involved a number of other participants. Many of the other participants in that tax shelter have settled their disputes with the United States, while others, Debtor among them, have not. One of the participants who did not settle with the United States has already received an adverse determination from the Tax Court with respect to his liability. *See* Charlton v. Commissioner, T.C. Memo, 1990-402 and

1991-285, aff'd 9/90, F.2d 1161 (9th Cir. 1993).

In arguing for relief from stay, the United States points out that Debtor's tax liability has gone unresolved for a significant period of time, that the matter has been pending in the Tax Court since 1987, and that the Tax Court has ruled on similar, if not identical issues, in the Charlton case. The United States contends that the Tax Court is therefore the better forum to resolve Debtor's liability. Debtor contends that stay relief should not be granted and that Debtor should be permitted to litigate his tax liability in this court. Indeed, on October 21, 1993, the same day as the hearing of the government's motion in this court, Debtor filed a motion pursuant to 11 U.S.C. Section 505 requesting that this court determine Debtor's tax liability. In support of this Motion, Debtor argued that the case could be litigated at less expense to the Debtor in this court, that the ultimate liability depended in large measure on Debtor's subjective intent in participating in the tax shelter and that the major dispute to be resolved, if not the only issue, was the Debtor's intent and not issues which were adversely resolved as a matter of law in the previous Tax Court litigation in the Charlton case.

CONCLUSIONS OF LAW

11 U.S.C. Section 362(d)(1) provides:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by

> terminating, annulling, modifying, or conditioning such stay . . . for cause, including the lack of adequate protection of an interest in property of such party in interest . . .

The legislative history to this provision reveals that "cause" may include a showing that adjudication of certain issues in another form is the most efficient method of litigation and judicial resources. *See e.g.*, H.R. Rep. No. 595, 95th Cong., 1st Sess. 343-344 (1977) ("[A] desire to permit an action to proceed to completion in another tribunal may provide another cause."). Caselaw supports such a construction of Section 362(d)(1), *see e.g.*, In re Kemble, 776 F.2d 802, 807 (9th Cir. 1985); Holtkamp v. Littlefield, 669 F.2d 505, 507-09 (7th Cir. 1982), and courts have, on occasion, granted the United States relief from stay to allow a proceeding in the United States Tax Court to proceed to judgment. *See e.g.*, In re Hunt, 95 B.R. 442, 448 (Bankr. N.D.Tex. 1989).

Nevertheless, under 28 U.S.C. Section 157(b)(2)(B), the determination of a debtor's tax liability constitutes a core proceeding. 11 U.S.C. Section 505 empowers the Bankruptcy Court to determine a debtor's tax liability as long as the merits of the tax claim have not been previously adjudicated in a contested proceeding before a court of competent jurisdiction. 11 U.S.C. §505(a)(1). *See also* In re Hunt, 95 B.R. at 444.

Thus, the basic issue presented by the parties' competing motions is whether this court or the United States Tax Court is the most appropriate forum to resolve Debtor's tax liability. In dealing with this issue, courts have identified a host of factors to be

considered, including:

> (1) The need to administer the bankruptcy case in an orderly and efficient manner;
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> (2) The complexity of the tax issues that must be decided;
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> (3) The asset and liability structure of the debtor;
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> (4) The length of time required for trial and a decision;
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> (5) Judicial economy and efficiency;
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> (6) The burden on the bankruptcy court's docket;
>
> (7) The prejudice to debtor, and the potential prejudice to the taxing authority responsible for collection from inconsistent assessments.

See e.g., In re Hunt, 95 B.R. at 445-448; In re Queen, 148 B.R. 256, 259 (Bankr. S.D.W.Va. 1992). This list is not exhaustive, and resolution of this issue requires a court to take into account all the facts and circumstances surrounding a case. For the following reasons, I conclude that the United States' motion for relief should be granted and Debtor's motion under Section 505 of the Code must be denied.

Debtor contends that the tax issues implicated by his case are straightforward, requiring this court to determine only his subjective intent in making his investment. Debtor correctly points out that most, if not all, of the issues surrounding the propriety of the partnerships which comprised the tax shelter were resolved in the Tax Court's opinion in Charlton. Nevertheless, issues such as the propriety of negligence

penalties, substantial understatement penalties, the reasonableness of relying on professional advice, and the like, must be resolved in determining Debtor's tax liability. Clearly, the Tax Court is far more familiar and experienced in dealing with such issues. The Tax Court's special expertise in this area, while perhaps not essential to determination of Debtor's tax liability, is certainly preferable. *See e.g.*, In re Universal Life Church, Inc., 127 B.R. 453 (E.D.Cal. 1991).

Furthermore, the length of time required to try Debtor's case could be substantial, placing a considerable burden on this court's docket. And Debtor's ex-wife, who is not a party to this proceeding, would maintain the absolute right to have her case tried in Tax Court regardless of how this court ruled on Debtor's tax liability. Thus, if this court determined Debtor's tax liability, the United States would likely be required to try the same case twice, once in this court for the Debtor, and a second time in Tax Court if Debtor's former wife was unhappy with the result. Consequently, judicial economy and efficiency clearly militate toward allowing Debtor's case to be tried in Tax Court.

Moreover, such an arrangement could easily result in inconsistent assessments which would prejudice the United States. This situation, commonly referred to as a "whipsaw effect", occurs when a non-debtor obtains a Tax Court judgment which is inconsistent with the decisions rendered in bankruptcy court based on identical issues of fact and law. *See e.g.*, In re Hunt, 95 B.R. at 446. Such a situation is well within the realm of possibility in the instant case.

Debtor's primary contention in defense of the United States' motion, and in support for his motion under Section 505 of the Bankruptcy Code, is that he will be unable to pursue a defense of the case if the trial of his case is allowed to proceed in Tax Court. The case is scheduled to be tried in New York, and Debtor claims that the extra expense involved in traveling to and from New York to attend the trial will prevent him from being able to fund an adequate defense of the case. In support of this contention, Debtor's quotes in his Supplemental Brief, In re Northwest Beverage, Inc., 46 B.R. 631 (Bankr.N.D.Ill. 1985), wherein the court stated:

> In enacting § 505, Congress was primarily concerned with protecting creditors from the dissipation of the estate's assets which could result if the creditors were bound by a tax judgment which the debtor, due to his ailing financial condition, did not contest.

The court in Northwest Beverage very accurately and succinctly states the policy behind section 505 of the Bankruptcy Code. It is as much a creditor protection as it is a debtor protection.

Debtor's asset and liability structure, however, reveal that there are essentially no creditors to protect in this case. Debtor's only secured creditor is the party holding a first mortgage on Debtor's residence (co-owned with his present wife), and this party is substantially oversecured. Debtor's only unsecured creditor, other than the United States, is Debtor's former wife, who is a party to the proceeding pending in Tax Court. Moreover, Debtor has no pre-petition liability to his former

wife. Thus, while an adverse ruling rendered in Tax Court might have an adverse impact on her status as a creditor of Debtor, she has her own independent motivation and obligation to see that the proceeding in Tax Court is properly defended. In sum, the policy concern expressed in section 505 of the Code is not implicated in this case.

Finally, and perhaps most importantly, Debtor appears to this court to be engaged in "forum shopping". Debtor is the party who initiated the proceeding which now pends in the Tax Court. When the adverse ruling in the Charlton case was handed down by that court, Debtor's negotiating position with the IRS was obviously weakened. Debtor, unable to reach a favorable settlement with the United States, filed his bankruptcy petition in this court on March 19, 1993, just three days before his case, which had been pending in Tax Court since 1987, was scheduled to be tried.

Thus, Debtor's primary motivation in filing his Chapter 11 petition and moving this court to determine his tax liability under Section 505 is to have his tax liability determined by a court other than the Tax Court. Debtor, realizing that the Tax Court had already ruled adversely to his position in a fellow participant's case, filed his bankruptcy petition to halt the trial of his case in Tax court and to gain leverage in his negotiations with the IRS. In moving this court to deny the United States' motion and grant his, Debtor is attempting to get a "second bite at the apple" by having his tax liability determined in a more favorable setting. This sort of "forum shopping" is not a proper use of Chapter 11 or Section 505 of the Bankruptcy Code.[1]

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[1] In fact, this case is not that different from the line of "bad faith filing" cases decided by the Eleventh Circuit. *See e.g.*, In re Albany Partners, Ltd., 749 F.2d 670 (11th Cir. 1984); In re Phoenix Piccadilly, Ltd., 849 F.2d 1393 (11th Cir. 1988); In re Dixie Broadcasting Co., 871 F.2d 1023 (11th Cir. 1989), *cert. denied*, 493 U.S. 853, 110 S.Ct. 154 (1989).

I therefore conclude that "cause" exists under Section 362(d)(1) of the Code for lifting the automatic stay and allowing the matter currently pending in the United States Tax Court to proceed to judgment.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Movant's Motion for Relief from Stay be granted. The automatic stay of 11 U.S.C. Section 362 is modified to the extent necessary to permit Movant to proceed to judgment with the matter pending against Debtor in the United States Tax Court. The collection of any tax obligation thus determined, however, remains under the protection of the automatic stay and Movant's remedy for same is vested in this Court.

FURTHER ORDERED that Debtor's motion to have this Court determine Debtor's tax liability pursuant to 11 U.S.C. Section 505 is hereby DENIED.

In this line of cases, the Eleventh Circuit made clear that a finding that a petition has been filed in bad faith may be "cause" under Section 362(d)(1) for granting relief from the automatic stay. These cases have identified a number of factors to be considered in assessing whether the debtor possesses an "intent to abuse the judicial process and the purposes of the reorganization provisions," including:

1) The timing of the filing of the bankruptcy petition;

2) Whether the debtor is financially distressed; and

3) Whether the petition was filed strictly to circumvent pending litigation.

Dixie Broadcasting, 871 F.2d at 1027, (citations omitted). Application of these factors to Debtor's Chapter 11 case strongly suggest such an intent to abuse the judicial process and purposes of Chapter 11.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ___ day of January, 1994.